

of Americans live in rental space. Approximately 55% of minorities do not own their own homes. In light of the fact that so many viewers are not protected by the Commission's current preemption rules, NRTC urges the Commission to extend its rules to cover all "viewers," as required by Section 207 of the Act, not just homeowners.^{34/}

37. Competition in the video delivery market can only exist if all Americans are able to choose freely how they wish to receive their video programming. Until the FCC broadens its preemptive policy to assure renters and common owners the same protection given all other consumers, competition cannot flourish. NRTC urges the Commission to continue to resolve pending Petitions for Preemption expeditiously, and to expand its preemption policy to protect all viewers.

D. Excessive Public Interest Obligations Will Thwart the Growth of a Still Nascent DBS Industry.

38. Section 25 of the 1992 Cable Act added a new Section 335 to the Communications Act of 1934, directing the Commission to conduct a rulemaking proceeding to impose public interest or other programming requirements on DBS service providers. Section 335(b) of the Communications Act of 1934, as amended, mandates that a DBS provider "reserve a portion of its channel capacity, equal to not less than four percent nor more than seven percent, exclusively for noncommercial programming of an

^{34/} 47 U.S.C. § 207.

educational or informational nature."^{35/} The Commission had initiated a rulemaking in this proceeding in March of 1993,^{36/} but further action was suspended until a legal challenge regarding the constitutionality of Section 335(b) was resolved.

39. In August of 1996, the United States Court of Appeals for the District of Columbia found Section 335(b) to be constitutional.^{37/} Subsequently, the Commission requested new and revised Comments to refresh the record in that proceeding. NRTC filed Reply Comments urging the Commission to permit DBS providers maximum latitude in meeting any new public service obligations. NRTC emphasized that for DBS to compete effectively against incumbent cable television providers in the MVPD market, the Commission must continue to be vigilant not to thwart DBS growth or viability by prematurely overburdening the industry with unnecessary regulations.

40. NRTC requested that the FCC limit to 4% the channel capacity which DBS providers will be required to reserve for noncommercial educational and informational programming. Although a 4% set aside represents the statutory minimum, it is sufficient to provide a substantial level of quality noncommercial educational or

^{35/} See 47 U.S.C. § 335.

^{36/} Implementation of Section 25 of the Cable Television Consumer Protections and Competition Act: Direct Broadcast Satellite Public Service Obligations, Notice of Proposed Rule Making, 8 FCC Rcd 1589 (1993).

^{37/} Time Warner Entertainment Co., L.P. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) (petition for rehearing denied).

informational programming. Furthermore, NRTC urged the FCC to measure channel capacity by the number of video channels actually offered to the public. Basing capacity decisions on the number of channels to which consumers subscribe will provide an easily measurable, objective standard while allowing DBS providers maximum flexibility to configure their program packages. NRTC argued that DBS providers should have the option of satisfying the set aside requirement either by dedicating certain channels to noncommercial educational or informational programming or through a cumulative hour approach. Finally, NRTC urged the FCC to define "noncommercial educational and informational programming" broadly so as to enable DBS providers to satisfy the set aside requirement with a wide array of programming, including such programming as "Channel Earth," a unique offering developed by NRTC and others specifically for rural America. NRTC again urges the FCC to ensure that the DBS public service obligation rules that do not unnecessarily hinder the growth of DBS as a competitor to cable.

**E. Electric Cooperative Pole Attachment Agreements
Should Remain a Matter of Contract.**

41. It has been brought to NRTC's attention by the National Rural Electric Cooperative Association (NRECA) that certain electric cooperatives distributing DBS services have been accused by the National Cable Television Association of unfairly overcharging competing cable operators for pole attachment rights. NRTC is aware of no electric cooperatives participating in DBS who are unfairly discriminating against competing cable companies through punitive pole attachment rates and conditions.

42. NRECA's recent survey of 525 of its distribution cooperative members shows that over 93% of these cooperatives own poles that are jointly used by other entities such as telephone companies and cable TV companies. The average rate they charge per pole is \$6.71, and some cooperatives do not charge any attachment fee whatsoever. In contrast, over 76% of the distribution cooperatives attach to poles owned by other entities. These cooperatives are charged an average of \$9.02 per pole. NRECA's survey indicates that some 84% of distribution cooperatives establish their pole attachment rates through negotiation.

43. Cooperatives are owned by their members. There is a downward pressure on the rates charged by electric cooperatives, according to NRECA, because the consumers they serve (their cooperative members) are also provided telephone and cable services by the attaching entities. As a result, any increased charge by the pole owner (the cooperative) would be passed on to the consumer (the cooperative member) through the rates charged by the attaching entity. The cooperative business structure acts to curb pole attachment rates.

44. NRTC supports NRECA's strong opposition to federal regulation of pole attachment rates for cooperatives. Pole attachment matters for cooperatives should be resolved through contractual arrangements, not government regulation.

III. CONCLUSION


Growth in DBS subscribership has increased dramatically since 1995, but full competition in the delivery of video programming will remain suppressed until the Commission is able to remove existing, unnecessary and counterproductive regulatory barriers. Competition can only be increased if the Commission provides MVPDs with the necessary tools to enforce Program Access rules by permitting aggrieved parties to recover damages from programming vendors acting in violation of the Commission's rules. Likewise, a recommendation from the Commission that Congress lift the copyright rules restricting carriage of network signals by satellite would help level the playing field and promote customer choice, while duly compensating network affiliates. The FCC also should foster customer choice in video delivery technologies by continuing to enforce and extend its DBS zoning preemption policy. NRTC further urges the Commission to promote competition by permitting DBS providers maximum latitude to meet any new public service obligations. Lastly, NRTC agrees with NRECA that the current exemption from federal pole attachment regulations should be retained for cooperatives.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Comments as part of its Annual Report to Congress on the Status of Competition in the Market for the

Delivery of Video Programming and to revise its rules and make recommendations to Congress in accordance with the views expressed herein.

Respectfully submitted,

**Steven T. Berman, Senior Vice President
Business Affairs and General Counsel
NATIONAL RURAL
TELECOMMUNICATIONS COOPERATIVE
2201 Cooperative Way, Suite 400
Woodland Park
Herndon, Virginia 20171
(703) 787-0874**

By: 
**Jack Richards
Paula Deza
KELLER AND HECKMAN LLP
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001
(202) 434-4210**

Dated: July 23, 1997